

**Before the
FEDERAL COMMUNICATIONS COMMISSIONS
Washington, DC 20554**

In the Matter of:)	
)	
Petition of Prodigy Diabetes Care, LLC for)	CG Docket No. 02-278
Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv))	CG Docket No. 05-338
)	

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (the “Order”), Petitioner Prodigy Diabetes Care, LLC (“Prodigy” or “Petitioner”) hereby requests that the Federal Communication Commission (“FCC” or “Commission”) grant Prodigy a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any alleged advertising faxes sent with the recipients’ prior express invitation or permission.

INTRODUCTION

Prodigy develops, markets, and sells talking blood glucose testing meters and associated strips for diabetic patients. Prodigy’s mission is to provide innovative, high quality, and affordably priced products to persons with diabetes.

Petitioner is a defendant in a putative class action lawsuit filed in the Eastern District of Arkansas alleging Petitioner sent fax advertisements without a complaint opt-out notice required by the Telephone Consumer Protection Act (“TCPA”). *See Rhea Drugstore, Inc. v. Prodigy Diabetes Care, LLC*, Case No. 4:15CV54-DPM (E.D.AR.) (“*Rhea* litigation”). (Complaint filed January 23, 2015 attached hereto as Ex. A).

The plaintiff in the *Rhea* litigation has asserted that regardless of whether the fax is unsolicited, a fax advertisement is illegal unless it includes an opt-out notice on its first page pursuant to TCPA's requirements (*See* Ex. A. ¶26, citing 47 U.S.C. §227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iv)). The purported class is not limited to persons or entities that allegedly received unsolicited fax ads. (*See* Ex. A ¶ 15). The *Rhea* litigation subjects Prodigy to potentially substantial monetary damages for alleged violations of the opt-out notice requirement for purported faxes sent with the recipient's prior express invitation or permission.

The FCC has recently acknowledged, however, that there was reasonable uncertainty as to the sender's obligation under the TCPA to include opt-out notices on solicited faxes. In an order released on October 30, 2014 (the "October 2014 Order"), the Commission acknowledged that a previous order regarding the requirement that opt-out notices be provided in solicited advertisements was confusing, and thus granted numerous retroactive waivers to certain senders of fax ads.¹

Specifically, the waivers provided "temporary relief from any past obligation to provide the opt-out notice to [recipients who previously consented to receive fax ads]."² The FCC's October 2014 Order invited similarly situated parties to seek retroactive waivers, as well.³

As explained more fully below, Petitioner is similarly situated in all material respects to those parties who have already received waivers in that Petitioner is potentially subject to a significant damage award on the basis of an FCC order that the Commission has already found engendered significant uncertainty and confusion. Accordingly, pursuant to the Commission's

¹ CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. October 30, 2014) ¶ 24 (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006)). (the "October 2014 Order")

² *Id.* ¶1.

³ *Id.* ¶2.

October 2014 Order and 47 C.F.R. § 1.3, Petitioner respectfully seeks a retroactive waiver of 42 C.F.R. § 64.1200(a)(4)(iv) for all faxes previously sent by Petitioner or on its behalf to come into compliance with the opt-out requirement.

ARGUMENT

A waiver of the Commission’s rules may be granted for good cause shown – that is, if, (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.⁴ In its October 2014 Order granting retroactive waivers of the opt-out notice requirement, the Commission concluded that both of these conditions were satisfied.

First, the Commission found that the confusion surrounding the applicability of the opt-out requirement to solicited fax ads constituted “special circumstances” that warrant a deviation from the general rule.⁵ Second, the Commission found that this confusion potentially subjected numerous senders to significant damage awards, and that therefore waiver served the public interest better than application of the rule.⁶ These findings apply with equal force to Petitioner, and therefore good cause exists to grant a retroactive waiver in this case, as well.

- A. Special Circumstances warrant deviation from the Rule because the FCC’s prior Orders caused confusion regarding the Opt-Out Notice Requirement for solicited fax ads.

As chronicled in the Commission’s October 2014 Order, confusion surrounding the opt-out notice requirement for solicited fax ads arose from two sources: (1) a footnote in a 2006 FCC order providing that “the opt-out notice requirement only applies to communications that

⁴ *Id.* ¶ 23 nn.82–83 (citing, *inter alia*, 47 C.F.R. § 1.3; *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)); *see also* 47 C.F.R. § 1.925(b)(3)(i)–(ii) (the Commission may grant a waiver where the underlying purpose of the rule(s) would not be served or the factual circumstances would render application of the rule inequitable, unduly burdensome or contrary to the public interest).

⁵ *Id.* ¶¶ 24–26

⁶ *Id.* ¶ 27

constitute unsolicited advertisements,”⁷ and (2) a lack of explicit notice that the Commission was contemplating an opt-out requirement on fax ads sent with the prior express permission of the recipient.⁸ With respect to the footnote in particular, the FCC found that “[t]he use of the word ‘unsolicited’ ... may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient,” and “caused confusion or misplaced confidence regarding the applicability of this [opt-out notice] requirement to faxes sent to those recipients who provided prior express permission.”⁹ The FCC concluded that the confusion caused by the footnote, combined with the aforementioned lack of explicit notice, constituted special circumstances that warranted deviation from Section 64.1200(a)(4)(iv).¹⁰

The circumstances of this case are identical in all material respects to those presented in the 2014 October Order. Indeed, there is “nothing in the record here demonstrating that the [P]etitioner understood that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.”¹¹ Accordingly, a finding of “special circumstances” is warranted here, as well.

B. A Retroactive Waiver would better serve the Public Interest than would inflexible application of the Rule.

Granting a retroactive waiver to Petitioner would also serve the public interest. As the Commission noted in its October 2014 Order, the lack of explicit notice and the contradictory footnote from the FCC’s 2006 order “resulted in a confusing situation for businesses or one that

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02–278, 05–338, Report and Order and Third Order on Reconsideration (2006) (“Junk Fax Order”), 21 FCC Rcd 3810, n.154 (emphasis added).

⁸ October 2014 Order ¶ 25.

⁹ *Id.* ¶ 24.

¹⁰ *Id.* ¶ 26.

¹¹ *Id.* ¶ 26.

caused businesses to mistakenly believe that the opt-out notice requirement did not apply,” leaving certain businesses potentially subject to significant damage awards under the TCPA.¹² The FCC determined that, on balance, it served the public interest to grant retroactive waivers of Section 64.1200(a)(4)(iv) to ensure that any such confusion did not result in inadvertent violations of the opt-out requirement for solicited fax ads.¹³

Here, too, the public interest is best served by granting a retroactive waiver to Petitioner. Petitioner is currently a defendant in a putative class action that will potentially subject it to significant attorneys’ fees, litigation expenses, and enormous penalties. In view of the above, Petitioner has taken measures to ensure future compliance with Section 64.1200(a)(4)(iv) and all other provisions of the TCPA.

CONCLUSION

Simply put, Petitioner is similarly situated in all material respects to those entities who received waivers in the Commission’s October 2014 Order. In light of the confusion over the Commission’s rules concerning the provision of opt-out notices for solicited fax ads, and Petitioner’s potentially enormous liability relating to its sending of solicited fax ads, the public interest is best served by granting a retroactive waiver to Petitioner.

Petitioner therefore respectfully requests a retroactive waiver from liability with respect to any facsimile advertisements sent by Petitioner with the prior express invitation or permission of the recipients or their agents, but which did not contain the opt-out notice required under 47 C.F.R. § 64.1200(a)(4)(iv).

Dated: March 12, 2015

CLEMENTS BERNARD PLLC

¹² *Id.* ¶ 27.

¹³ *Id.* ¶ 27.

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EXHIBIT A

Complaint

Rhea Drugstore, Inc. v. Prodigy Diabetes Care LLC, CASE NO. 4:15CV54-DPM (E.D.AR.)

JAN 23 2015

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JAMES W. McCORMACK, CLERK
By: _____ DEP. CLERK

RHEA DRUGSTORE, INC.,
individually and on behalf of
all others similarly situated,

PLAINTIFF

v.

CASE NO. 4:15 CV 54- DPM

PRODIGY DIABETES CARE, LLC,

DEFENDANT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, Rhea Drugstore, Inc. (herein "Plaintiff"), on behalf of itself and all other similarly situated, brings this Complaint against Prodigy Diabetes Care, LLC ("Defendant") for violations of the Telephone Consumer Protection Act. Plaintiff seeks certification of its claims against Defendant as a class action. In support thereof, Plaintiff states as follows:

INTRODUCTION

1. This case challenges Defendant's policy and practice of faxing unsolicited advertisements without providing an opt-out notice as required by law.

2. Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to regulate the fast-growing expansion of the telemarketing industry. As is pertinent here, the TCPA and its implementing regulations prohibit persons within the United States from sending advertisements via fax without including a

detailed notice that allows recipients to expeditiously opt out of receiving future solicitations.

3. Junk faxes disrupt recipients' peace, drain recipients' paper, ink, and toner, and cause recipients tangible damages. Junk faxes also cause recipients to waste valuable time retrieving and discerning the purpose of the faxes; prevent fax machines from receiving and sending authorized faxes; and cause undue wear and tear on recipients' fax machines. Plaintiff is a pharmacy that must use its fax machine to receive communications about medical patients. That purpose is impeded when Plaintiff's fax machine is invaded by junk faxes.

4. The TCPA provides a private right of action and statutory damages of \$500 per violation, which may be trebled when the violation is willful or knowing.

5. On behalf of itself and all others similarly situated, Plaintiff brings this case to recover damages for violations of the TCPA and to enjoin Defendant from future TCPA violations.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

7. Venue in this district is proper because a significant portion of the events giving rise to Plaintiff's claim took place here. Specifically, Defendant sent illegal faxes to Plaintiff's place of business in this district.

PARTIES

8. Plaintiff, Rhea Drugstore, Inc., is a family-owned pharmacy located in Little Rock, Arkansas.

9. Defendant Prodigy Diabetes Care, LLC, is a medical-device company that has its principal place of business in Charlotte, North Carolina, and that is organized under the laws of North Carolina.

FACTS

10. In December 2014, Defendant sent a three-page, unsolicited advertisement to Plaintiff's ink-and-paper facsimile machine. Page One states that the subject of the fax is "Prodigy Low Cost Diabetic Test Strips and Free Meters." It invites the recipient to "[p]lace an order with you wholesaler or buy direct from the manufacturer." Page Two is presented in the form of a letter from Rick Roberts, Senior Director, Retail Markets. It announces that Defendant has extended the promotional term for its Prodigy Combo Pre-Packs until the end of 2015. Page Three is an order form for various of Defendant's products. A copy of this facsimile is attached hereto and marked as Exhibit A.

11. Exhibit A is exemplary of the junk faxes Defendant sends.

12. Exhibit A lacks a timestamp showing the date and time the fax was sent and the telephone number of the sending machine, contrary to the requirements of 47 U.S.C. § 227(d)(1)–(2).

13. Defendant did not have Plaintiff's prior express invitation or permission to send advertisements to Plaintiff's fax machine.

14. Defendant's faxes lack an opt-out notice of any sort, much less one that complies with the TCPA.

CLASS ALLEGATIONS

15. In accordance with Fed. R. Civ. P. 23, Plaintiff brings this action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons (the “Class”):

All persons and entities who hold telephone numbers that received a facsimile transmission from Defendant at any time from January 23, 2011, to present (the “Class Period”) that 1) promotes Defendant’s products and 2) lacks an opt-out notice compliant with the requirements of the TCPA.

16. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is proper.

17. Excluded from the Class are Defendant, any parent, subsidiary, affiliate, or controlled person of Defendant, as well as the officers, directors, agents, servants, or employees of Defendant and the immediate family members of any such person. Also excluded are any judge who may preside over this case and any attorneys representing Plaintiff or the Class.

18. Numerosity [Fed. R. Civ. P. 23(a)(1)]. The class is so numerous that joinder is impractical. Upon information and belief, Defendants have sent illegal fax advertisements to hundreds if not thousands of other recipients.

19. Commonality [Fed. R. Civ. P. 23(a)(2)]. Common questions of law and fact apply to the claims of all Class members and include (but are not limited to) the following:

(a) Whether Defendant sent faxes advertising the commercial availability of property, goods, or services;

(b) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent Exhibit A and other fax advertisements;

(c) Whether Defendant faxed advertisements without first obtaining the recipient's prior express permission or invitation;

(d) Whether Defendant's advertisements contained the opt-out notice required by law;

(e) Whether Defendant sent the fax advertisements knowingly or willfully;

(f) Whether Defendant violated 47 U.S.C. § 227;

(g) Whether Plaintiff and the other members of the Class are entitled to statutory damages; and

(h) Whether the Court should award treble damages.

20. Typicality [Fed. R. Civ. P. 23(a)(3)]. Plaintiff's claims are typical of the claims of all Class members. Plaintiff received an unsolicited fax advertisement from Defendant during the Class Period. Plaintiff makes the same claims that it makes for the Class members and seeks the same relief that it seeks for the Class members. Defendant has acted in the same manner toward Plaintiff and all the Class members.

21. Fair and Adequate Representation [Fed. R. Civ. P. 23(a)(4)]. Plaintiff will fairly and adequately represent and protect the interests of the Class. It is interested in this matter, has no conflicts, and has retained experienced class counsel to represent the Class.

22. Predominance and Superiority [Fed. R. Civ. P. 23(b)(3)]. For the following reasons, common questions of law and fact predominate and a class action is superior to other methods of adjudication:

(a) Proof of Plaintiff's claims will also prove the claims of the Class without the need for separate or individualized proceedings;

(b) Evidence regarding defenses or any exceptions to liability that Defendant may assert will come from Defendant's records and will not require individualized or separate inquiries or proceedings;

(c) Defendant has acted and continues to act pursuant to common policies or practices in the same or similar manner with respect to all Class members;

(d) The amount likely to be recovered by individual Class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based on common proofs.

(e) This case is inherently well-suited to class treatment in that:

(i) Defendant identified persons or entities to receive its fax transmissions, and it is believed that Defendant's computer and business records will enable Plaintiff to readily identify class members and establish liability and damages;

(ii) Common proof can establish Defendant's liability and the damages owed to Plaintiff and the Class;

(iii) Statutory damages are provided for in the statute and are the same for all Class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims, and it will foster economies of time, effort, and expense;

(v) A class action will contribute to uniformity of decisions concerning Defendant's practices;

(vi) As a practical matter, the claims of the Class are likely to go unaddressed absent class certification.

CAUSE OF ACTION

Violation of the Telephone Consumer Protection Act 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)

23. The TCPA provides strict liability for sending fax advertisements in a manner that does not comply with the statute. Recipients of fax advertisements have a private right of action to seek an injunction or damages for violations of the TCPA and its implementing regulations. 47 U.S.C. § 227(b)(3).

24. The TCPA makes it unlawful to send any "unsolicited advertisement" via fax unless certain conditions are present. 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).

25. Unsolicited faxes are illegal if the sender and recipient do not have an “established business relationship.” 47 U.S.C. § 227(b)(1)(C)(i). “Established business relationship” is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 U.S.C. § 227(a)(2); 47 C.F.R. § 64.1200(f)(6).

26. Regardless of whether the sender and recipient have an established business relationship, and regardless of whether the fax is unsolicited, a faxed advertisement is illegal unless it includes an opt-out notice on its first page that complies with the TCPA’s requirements. *See* 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iv). To comply with the law, an opt-out notice must (1) inform the recipient that the recipient may opt-out of receiving future faxes by contacting the sender; (2) provide both a domestic telephone number and a facsimile machine number—one of which must be cost-free—that the recipient may contact to opt out of future faxes; and (3) inform the recipient that the sender’s failure to comply with an opt-out request within thirty days is a violation of law. *See* 47 U.S.C. § 227(b)(2)(D); 47 CFR § 64.1200(a)(4)(iii).

27. Defendant faxed an unsolicited advertisement to Plaintiff that did not have a compliant opt-out notice, in violation of 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4).

28. Defendant knew or should have known (a) that Plaintiff had not given express invitation or permission for Defendant to fax advertisements about its products; (b) that Defendant's faxes did not contain a compliant opt-out notice; and (c) that Exhibit A is an advertisement.

29. Defendant's actions caused damage to Plaintiff and the Class members. Defendant's junk faxes caused Plaintiff and the Class members to lose paper, toner, and ink consumed in the printing of Defendant's faxes through Plaintiff's and the Class members' fax machines. Defendant's faxes cost Plaintiff and the Class members time that otherwise would have been spent on Plaintiff's and the Class members' business activities.

REQUEST FOR RELIEF

WHEREFORE Plaintiff, individually and on behalf of all others similarly situated, respectfully requests that this Court:

- a) determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure;
- b) award damages for each violation in the amount of actual monetary loss or \$500, whichever is greater, and treble those damages;
- c) enjoin Defendant from additional violations; and

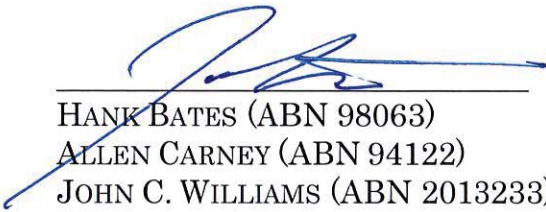
d) grant such other legal and equitable relief as the Court may deem appropriate, including costs and attorney's fees.

JURY DEMAND

Plaintiff and the Class members hereby request a trial by jury.

Dated: January 23, 2015

Respectfully submitted,



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Counsel for Plaintiff and Proposed Class

EXHIBIT A



PRODIGY®

www.prodigymeter.com

To:

From: Medical Devices Operations, LLC

Subject: Prodigy Low Cost Diabetic Test Strips and Free Meters

Message: Save on diabetic supplies and get Free State of the Art Prodigy Autocode Talking Meters with the Prodigy Combo Pack. Place an order with your wholesaler or buy direct from the manufacturer. Feel free to contact your Prodigy rep at 704-285-6460 to learn more.

Prodigy Diabetes Care

9300 Harris Corners Parkway Suite 450 Charlotte, NC 28269

Tel: 704-285-6400

Email: info@prodigymeter.com Website: <http://www.prodigymeter.com>



1 800.366.5901
www.prodigymeter.com

Prodigy Diabetes Care, LLC
2701 A Hutchinson McDonald Road
Charlotte, North Carolina 28269

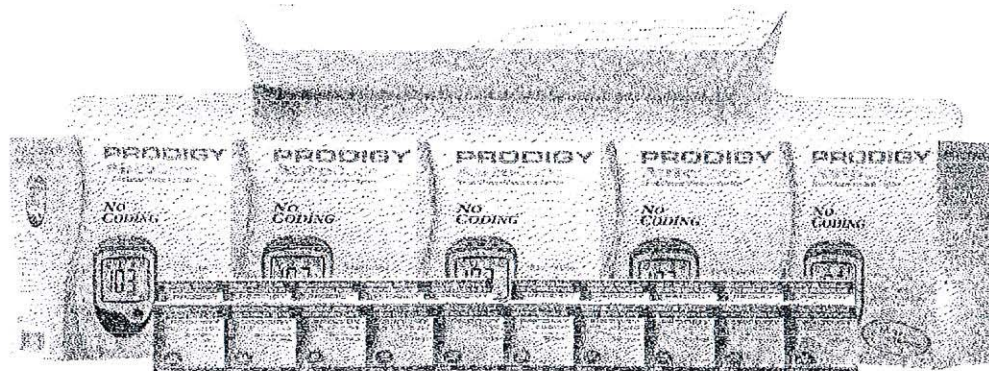
December 9, 2014

Dear Valued Customer,

We are pleased to announce that we have extended the promotional term for our Prodigy Combo Pre-Packs #75100. The combo will now be made available through the end of the 2015 calendar year.

Each Prodigy Combo Pre-Pack #75100 contains:

- 5 x No-Charge AutoCode Talking Meter Kits #70120 (Not For Retail Sale)
- 20 x (50-ct) No Coding Test Strips #73200 (Medicare, Cash and Select Health Plans [Humana*])



Ordering Information:

DESCRIPTION	ITEM NOC & UPC #s	WAC
Prodigy Combo Pre-Pack Contents: 5 x No-Charge AutoCode Talking Meter Kits #70120 (Not For Retail Sale) 20 x (50-ct) No Coding Test Strips #73200 (Medicare, Cash and Select Health Plans [Humana*]) Carton Specifications: L: 10 7/8", W: 9 7/8", H: 9 3/8" Carton Weight: 4.60 LBS	75100 08484-0751-00 384840751002	\$110.00** Includes 5 No-Charge Meters

Prodigy's Combo Pre-Pack offers significant savings and is an excellent choice for Medicare, Cash and Humana* diabetes patients. Thank you for your support and for stocking up today.

Sincerely,

Rick Roberts,
Senior Director, Retail Markets

* Verify eligibility prior to billing.

** Wholesale cost of goods applies.

Prodigy Diabetes Care (Top Items) Product Details with Order Entry #'s: **AmerisourceBergen Order #s, Cardinal Health CIN #s & McKesson Econo most #s**

Product Description	NDC#	UPC#	ORDER #	WAC*
Prodigy AutoCode Talking Meter Kit #70120 (Speaks in 4 Languages: English, Spanish, French & Arabic)	08484-0701-20	384840701205	ABC 10010958 CIN 4264040 MCK 2173466	\$7.95
Prodigy Pocket Meter Kit #70802-B	08484-0708-02	384840708020	ABC 10007521 CIN 4264057 MCK 1630029	\$7.95
Prodigy Voice Meter Kit #71950	08484-0719-50	384840719507	ABC 10007276 CIN 4264024 MCK 2172054	\$55.00
Prodigy No-Coding Test Strips 50ct #73200 (Medicare-Cash-Humana) Net SKU - (Pink Box)	08484-0732-00	384840732001	ABC 10117286 CIN 4875845 MCK 1970987	\$5.50
Prodigy No-Coding Test Strips 50ct #72500 (Commercial Insurance Plans) Rebated SKU - (Blue / Green Box)	08484-0725-00	384840725003	ABC 10009672 CIN 4335733 MCK 2171502	\$17.95
Prodigy Combo Pre-Pack #75100 Contents: 20 X 50ct Prodigy No-Coding Test Strips #73200 (Medicare-Cash-Humana) Net SKU (Pink Box) 5 x NO-CHARGE Prodigy AutoCode Talking Meter Kits #70120	08484-0751-00	384840751002	ABC 10129584 CIN 4980645 MCK 2054799	\$110.00
Prodigy Control Solution (Low) 4ml #990310	08484-9903-10	384849903105	ABC 10007282 CIN 4262721 MCK 1439884	\$2.00
Prodigy Twist Top Lancets 28G (100ct) #081028	08484-0810-28	384840810280	ABC 10108720 CIN 4891727 MCK 1911999	\$1.85
Prodigy Lancing Device Adjustable Depth W/Clear Cap #990355	08484-9903-55	38484990355	ABC 10007278 CIN 4262812 MCK 1439924	\$3.00

*WAC = Wholesaler Acquisition Cost Prior to Mark-Up +/-